



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 14, 2012

Ms. Melissa A. Mihalick
Counsel for the College of the Mainland
Bracewell & Giuliani, LLP
711 Louisiana Street, Suite 2300
Houston, Texas 77002-2770

OR2012-07099

Dear Ms. Mihalick:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 453623.

The College of the Mainland (the "college"), which you represent, received a request for information pertaining to (1) selection and hiring committees; (2) certain attorney and legal fees; (3) certain settlement agreements; (4) any report or communication with the U.S. Department of Education ("DOE"), or with the U.S. Office of Civil Rights ("OCR") from 2007 to the date of the request; (5) specified complaints filed by a named individual; (6) any report or communication with the Texas Higher Education Coordinating Board ("THECB"), regarding any issues at the college; (7) any report or communication with the Galveston County District Attorney's Office from 2007 to the date of the request; (8) specified contracts; (9) any report or communication from an external auditor, concerning issues with student registration, student payments, employee pay, or any other major college activity; (10) any report or communication between specified individuals and entities; and (11) the college transcript of a named individual.¹ You state you do not possess information

¹We note the college sought and received clarification from the requestor regarding the request. See Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); see also *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

responsive to two categories of the request.² You state some of the requested information is being made available to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.116 of the Government Code.³ We have considered the exceptions you claim and reviewed the submitted representative sample of information.⁴ We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note you have only submitted information that is responsive to the request for reports or communications from the OCR; reports or communications related to certain complaints filed by a named individual; reports or communications from THECB concerning issues at the college; reports or communications received by an external auditor; and reports or communications concerning the college's compliance with SACS policies. Thus, to the extent any information responsive to the remainder of the request existed when the college received the request, we assume you have released it. If you have not released any such information to the requestor, you must do so at this time. *See id.* §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we note the United States DOE has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, does not permit state and local educational authorities to disclose to this office, without parental consent or an adult student's consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.⁵ Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. *See* 34 C.F.R. § 99.3 (defining "personally identifiable information"). In this

²The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio, 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

³Although you raise section 552.117 of the Government Code, you have not submitted arguments in support of this exception; therefore, we assume you have withdrawn this exception. *See* Gov't Code §§ 552.301, .302.

⁴We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office. We note portions of Exhibit C are redacted. The college represents to this office that these records were obtained by the college from the OCR with these redactions in place.

⁵A copy of this letter may be found on the Office of the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

instance, the submitted information may include unredacted education records. Because our office is prohibited from reviewing these records to determine the applicability of FERPA, we will not address the applicability of FERPA to any of the submitted records. *See* 20 U.S.C. § 1232g(a)(1)(A). Such determinations under FERPA must be made by the educational authority in possession of the education records.⁶ We will, however, consider your arguments against disclosure of the submitted information.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses the doctrine of common-law privacy. Common-law privacy protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both elements of the test must be established. *Id.* at 681-82. We note this office has found the public has a legitimate interest in the qualifications and work conduct of employees of governmental bodies. *See* Open Records Decision Nos. 562 at 10 (1990), 542 at 5 (1990); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). However, this office has found personal financial information not related to a financial transaction between an individual and a governmental body is intimate or embarrassing and of no legitimate public interest. *See* Open Records Decision Nos. 600 (1992) (public employee’s withholding allowance certificate, designation of beneficiary of employee’s retirement benefits, direct deposit authorization, and employee’s decisions regarding voluntary benefits programs, among others, are protected under common-law privacy), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history protected under common-law privacy), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). Upon review, we find the personal financial information in the submitted information, which we have marked, is highly intimate or embarrassing and a matter of no legitimate public interest and must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

You claim some of the remaining requested information is excepted from disclosure under section 552.102 of the Government Code. Section 552.102(a) excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” Gov’t Code § 552.102(a). You assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101, which is discussed above. *See Indus. Found.*, 540 S.W.2d at 685. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court ruled the privacy test under

⁶In the future, if the college does obtain parental or an adult student’s consent to submit unredacted education records and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has expressly disagreed with *Hubert's* interpretation of section 552.102(a) and held its privacy standard differs from the *Industrial Foundation* test under section 552.101. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. Dec. 3, 2010). The Supreme Court then considered the applicability of section 552.102, and held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Id.* at 348. Upon review, we find none of the remaining information is excepted under section 552.102(a) of the Government Code, and it may not be withheld on that basis.

Section 552.116 of the Government Code provides:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from [required public disclosure under the Act]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [required public disclosure] by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You state the college is an institution of higher education as defined by section 61.003 of the Education Code. You state Exhibit D consists of audit working

papers that were created during an audit conducted under section 1.13 of Title 19 of the Texas Administrative Code, which authorizes the Internal Auditor for the THECB to develop an annual audit plan and conduct audits as specified in the plan. We note section 1.13 of Title 19 of the Texas Administrative Code authorize the THECB, and not the college, to conduct such audits. *See* 19 T.A.C. § 1.13. You have provided no arguments that the information at issue constitutes working papers of an audit conducted by the college. Thus, we conclude that you have failed to establish that section 552.116 of the Government Code is applicable to any of the submitted information, and it may not be withheld under this exception.

We note that portions of the remaining information are subject to section 552.137 of the Government Code.⁷ Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). Accordingly, the college must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their public disclosure.⁸

In summary, the college must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The college must also withhold the information we have marked under section 552.137 of the Government Code. The remaining information must be released.⁹

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public

⁷The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁸Open Records Decision No. 684 (2009) is a previous determination authorizing all governmental bodies to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

⁹We note the remaining information contains a social security number. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act.

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jeffrey W. Giles".

Jeffrey W. Giles
Assistant Attorney General
Open Records Division

JWG/eb

Ref: ID# 453623

Enc. Submitted documents

c: Requestor
(w/o enclosures)